

No. 16292 ✓

United States
Court of Appeals
for the Ninth Circuit

JACK PAUL BROWN,

Appellant,

vs.

DEAN KAYLER, CHRIS DAHL d/b/a Kayler-
Dahl Fish Company,

Appellees.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Division Number One.

FILED

FEB 25 1959

PAUL P. O'BRIEN; CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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COUNSEL OF RECORD

For Jack Paul Brown, Appellant:

ZIEGLER, ZIEGLER & CLOUDY,
Box 1079,
Ketchikan, Alaska.

For Dean Kayler, Chris Dahl and John Doe, d/b/a
Kayler-Dahl Fish Company, Appellee:

ROBERTSON, MONAGLE & EASTAUGH,
Box 1211,
Juneau, Alaska.

The District Court for the District of Alaska,
Division Number One, at Ketchikan

In Admiralty—Civil Action—File No. 3773-KA

JACK PAUL BROWN,

Libelant,

vs.

DEAN KAYLER, CHRIS DAHL and JOHN
DOE, d/b/a KAYLER-DAHL FISH COM-
PANY,

Respondent.

LIBEL

For cause of suit, libelant alleges:

I.

That at the times herein mentioned the above-named persons were engaged, under the name and style of Kayler-Dahl Fish Company, in Alaska, in the commercial fishery, and maintained at Excur-sion Inlet, Alaska, in the North Pacific Ocean, the vessel Homer; that the above-named persons owned said vessel and controlled and operated same in connection with said fishery.

II.

That at about 8:00 p.m., on September 27th, 1954, at said place, libelant landed his vessel, the Rebecca, alongside the Homer, in the navigable waters of the North Pacific Ocean; that he then had aboard his vessel a catch of salmon and sold the same to re-spondent, delivered same aboard the Homer, and

was directed by respondent to board the *Homer* in order to receive payment for his fish so delivered.

III.

That in order to do so, he was obliged to and did proceed over the top deck of the *Homer*, from the bow to the pilot house at the stern of the *Homer*; that in so doing, and at a distance of 8 feet more or less, from the pilot house, the deck became uneven, and dropped down several feet from the deck over which libelant was proceeding; that upon reaching the point where there was such change in the level of the deck, libelant fell and struck his head against the pilot house, or other structure of the *Homer*, sustaining injuries which resulted in his total disability.

IV.

That all of said injuries and consequent damages are a direct result of the failure of respondent to furnish libelant a good, safe and proper means of reaching the pilot house of the *Homer*, and by reason of the failure of respondent to furnish a seaworthy vessel, in that the deck was uneven and the *Homer* was insufficiently lighted to enable libelant to see the condition of the deck; that the vessel was unseaworthy also in that at the point where said accident occurred, there was hatch coaming raised above the deck which obscured from libelant the condition of the deck over which he fell; that respondent was negligent in the respect hereinbefore set forth, and that the accident and injuries received by libelant were due to said negligence.

V.

That as a result of said accident libelant sustained the following injuries: Fracture, skull, occipital, with cerebral concussion, hypertrophic osteo-arthritis changes in the cervical vertebrae and strain of cervical and lumbar muscles, caused by the fall, resulting in almost total blindness, pain and suffering and destruction of earning power, to his total damage of \$50,000.00.

VI.

That all and singular the matters set forth herein are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, the libelant prays that process in due form of law issue against the respondent, requiring it to answer the premises, and that this Honorable Court may decree to the libelant as follows:

Damages in the sum of \$50,000.00, with attorneys fees and costs, and such other, further and different relief as the nature of the case may require.

ZIEGLER, ZIEGLER &
CLOUDY,

By /s/ A. H. ZIEGLER,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed November 29, 1956.

[Title of District Court and Cause.]

EXCEPTIONS TO LIBEL

To the District Court for the District of Alaska,
Division Number One, at Ketchikan, in Ad-
miralty:

The exceptions of Respondents Dean Kayler,
Chris Dahl, and Kayler-Dahl Fish Company, claim-
ants of the vessel Homer, allege as follows:

1.

That it appears from the libel and its averments that Libelant's claimed injuries were suffered on September 27, 1954, more than two years prior to the filing on November 29, 1956, of the libel and to the issuance on November 29, 1956, of the Monition herein, and disclose the staleness of Libelant's demand and his guilt of laches herein, whereas Section 55-2-7, ACLA, 1949, provides that an action for any injury to the person or to the rights of another not arising from contact shall be brought within two years from the date of suffering such injury.

2.

That the facts averred in the libel are insuffi-
cient to constitute a cause of action.

3.

That the facts averred in the libel do not con-
stitute a cause of action within the admiralty and
maritime jurisdiction of this Court.

Dated at Juneau, Alaska, December 19, 1956.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Proctors for Respondents Dean Kayler, Chris Dahl
and Kayler-Dahl Fish Company.

[Endorsed]: Filed December 21, 1956.

[Title of District Court and Cause.]

RESPONDENTS' STIPULATION
FOR COSTS

Whereas, a libel was filed in this Court on the 29th day of November, 1956, by Jack Paul Brown, Libelant, against Dean Kayler, Chris Dahl, and John Doe, doing business as Kayler-Dahl Fish Company, Respondent, for reasons and causes in said libel mentioned;

And the Respondents, Dean Kayler, Chris Dahl, and Kayler-Dahl Fish Company, parties hereto, and the United States Fidelity and Guaranty Company, a corporation, Surety, hereby consenting and agreeing that in case of default or contumacy on the part of said Respondents or said surety, execution may issue against their goods, chattels and lands for the sum of Five Hundred Dollars.

Now, Therefore, It Is Hereby Stipulated and Agreed for the benefit of whom it may concern, that

the undersigned shall be, and each of them is, bound in the sum of Five Hundred Dollars, conditioned the above-named Dean Kayler, Chris Dahl, and Kayler-Dahl Fish Company shall pay all costs and charges that may be awarded against them in any decree by this Court, or, in case of appeal, by the Appellate Court.

DEAN KAYLER, CHRIS DAHL, and KAYLER-
DAHL FISH COMPANY,

Respondents;

By /s/ R. E. ROBERTSON,

This Proctor, Principals.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

By /s/ R. E. ROBERTSON,

Attorney-in-Fact.

Taken and acknowledged before me this 19th day of December, 1956, by R. E. Robertson as Proctor for said Respondents and as Attorney-in-Fact for the United States Fidelity and Guaranty Company.

[Seal] /s/ FREDERICK O. EASTAUGH,
Notary Public for Alaska.

My commission expires June 10, 1958.

[Endorsed]: Filed December 21, 1956.

[Title of District Court and Cause.]

AMENDED LIBEL

Comes now libelant, leave of Court first having been obtained, and files his amended libel, and alleges:

I.

That at the times herein mentioned the above-named persons were engaged, under the name and style of Kayler-Dahl Fish Company, in Alaska, in the commercial fishery, and maintained at Excursion Inlet, Alaska, in the North Pacific Ocean, the vessel Homer; that the above-named persons owned said vessel and controlled and operated same in connection with said fishery.

II.

That at about 8 p.m. on September 27th, 1954, at said place, libelant landed his vessel, the Rebecca, alongside the Homer, in the navigable waters of the North Pacific Ocean; that he then had aboard his vessel a catch of salmon and sold the same to respondent, delivered same aboard the Homer, and was directed by respondents to board the Homer in order to receive payment for his fish so delivered.

III.

That in order to do so, he was obliged to and did proceed over the top deck of the Homer, from the bow to the pilot house at the stern of the Homer; that in so doing, and at a distance of 8 feet more or

less, from the pilot house, the deck became uneven, and dropped down several feet from the deck over which libelant was proceeding; that upon reaching the point where there was such change in the level of the deck, libelant fell and struck his head against the pilot house, or other structure of the *Homer*, sustaining injuries which resulted in his total disability.

IV.

That all of said injuries and consequent damages are a direct result of the failure of respondent to furnish libelant a good, safe and proper means of reaching the pilot house of the *Homer*, and by reason of the failure of respondent to furnish a seaworthy vessel, in that the deck was uneven and the *Homer* was insufficiently lighted to enable libelant to see the condition of the deck; that the vessel was unseaworthy also in that at the point where said accident occurred, there was hatch coaming raised above the deck which obscured from libelant the condition of the deck over which he fell; that respondent was negligent in the respect hereinbefore set forth, and that the accident and injuries received by libelant were due to said negligence.

V.

That as a result of said accident libelant sustained the following injuries: Fracture, skull, occipital, with cerebral concussion, hypertrophic osteo-arthritis changes in the cervical vertebrae and strain of cervical and lumbar muscles, caused by

the fall, resulting in almost total blindness, pain and suffering and destruction of earning power, to his total damage of \$50,000.00.

VI.

That all and singular the matters set forth herein are true and within the admiralty jurisdiction of this Honorable Court.

VII.

Libelant alleges that the libel was not filed within 2 years from the date of the accident, but alleges libelant was not guilty of laches and the delay is not inexcusable for the following reasons.

VIII.

As a result of said accident libelant had not recovered from the injuries sustained before the expiration of the two-year period fixed by the Alaska Statute, and has not now recovered from same; that he wished to delay commencement of the suit as long as possible in order to determine as well as he could the extent of his injuries; that, however, he filed a suit under the Alaska Statute for damages before the expiration of said two-year period; that said suit was filed against Kayler-Dahl Fish Co., Inc., a corporation; that libelant believed and reported to his counsel that the owner of the barge Homer, upon which he was injured, was operated by and under the control of said corporation; that libelant is an Indian and unfamiliar with legal mat-

ters as to whether anyone who represents itself as a company, which respondent did at the time of the accident, was a trade name, company or corporation, but honestly believed and so reported to his counsel that respondent was a corporation; that after suit was filed and against respondent as a corporation, a motion was filed to dismiss based on the ground that Kayler-Dahl Fish Co., Inc., a corporation, was not in existence on the date of the accident, although it had been in existence as a corporation for a long time prior to the accident; that investigation of respondents' claim as to the dissolution of the corporation disclosed that the corporation had been dissolved prior to the date of the accident; that for such reason libelant could not oppose said motion to dismiss and his action was dismissed; that said motion to dismiss was not filed until the two-year period had expired and libelant could not refile his suit under the Alaska Statute within the two-year period.

IX.

Libelant believes and alleges that respondents were the owners of all the assets of said dissolved corporation; that upon dissolution, the entire assets were transferred to respondents who still conducted the business under the name of Kayler-Dahl Fish Company; that any judgment in this suit against respondents would be against them as individuals and they are not prejudiced by the short delay any greater than if the suit under the Alaska Statute

had been commenced against them as individuals, rather than as a corporation, as it was.

X.

Libelant further alleges that this is a suit in personam and the rights of lien creditors and others cannot be prejudiced by the prosecution of this suit.

XI.

Libelant alleges that if the doctrine of laches be applied in his suit he will be deprived of his day in court and will sustain incalculable loss and damage.

Wherefore, Libelant prays that process in due form of law issue against the respondents, requiring them to answer the premises, and that this Honorable Court may decree to the libelant as follows:

Damages in the sum of \$50,000.00, with attorneys fees and costs, and such other, further and different relief as the nature of the case may require.

ZIEGLER, ZIEGLER &
CLOUDY,

By /s/ A. H. ZIEGLER,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed April 25, 1957.

[Title of District Court and Cause.]

EXCEPTIONS TO AMENDED LIBEL

To the District Court for the District of Alaska,
Division Number One, at Ketchikan, in Ad-
miralty:

The exceptions of Respondents Dean Kayler,
Chris Dahl, and Kayler-Dahl Fish Company, claim-
ants of the vessel Homer, allege as follows:

1.

That it appears from the Amended Libel and its averments that Libelant's claimed injuries were suffered on September 27, 1954, more than two years prior to the filing on November 29, 1956, of the Libel and to the issuance on November 29, 1956, of the Monition herein, which disclose the staleness of Libelant's demand and his guilt of laches herein, whereas Section 55-2-7, ACLA 1949, provides that an action for any injury to the person or to the rights of another not arising from contract shall be brought within two years from the date of suffering such injury.

2.

That the facts averred in the Amended Libel are insufficient to constitute a cause of action, and do not show that Libelant was either a seaman, a shipper or a passenger, or that the alleged unseaworthiness of the barge Homer gives any right of action to Libelant, or that Libelant has any claim or right of action against Libelees because of the

alleged unseaworthiness of the barge, Homer, or that a good, safe and proper means of reaching the pilot house of said vessel was not furnished to Libelant or that the means furnished was not in accordance with the usual construction of such vessels as the barge, Homer, or that Libelant was not priorly informed and knew the construction of said vessel and the means by which to reach the pilot house thereof, or that Libelant's alleged injuries were proximately caused by any negligence of Libelees or either of them.

3.

That the facts averred in the Amended Libel do not constitute a cause of action within the admiralty and maritime jurisdiction of this Court.

4.

Libelees further except to Paragraphs VII, VIII, IX, X and XI of the Amended Libel on the ground they do not state a valid excuse for Libelant's failure to file his action within two years from the date of incurring his alleged injuries on September 27, 1954, and fail to show that Libelees or any of them were at fault for Libelant's said failure; that Libelant was represented by competent, practicing proctors prior to two years before September 27, 1956; that the corporate records of the Territory of Alaska are public records, and Libelant and his proctors knew or should have known when he instituted in this Court his civil action No. 3731-KA, that no corporation by the name of Kayler-Dahl Fish Co., Inc., or similar name, was registered for

the doing of business in Alaska on September 27, 1954, and also that the U. S. Customs records, which are also public records, did not show that on September 27, 1954, any such named or similarly named corporation owned or had any interest in the barge Homer; that Libelees have never been officially informed that said Civil Action No. 3731-KA has been dismissed; that Libelant is solely at fault for his staleness and laches in instituting this suit and in presenting his claim therein.

Dated at Juneau, Alaska, April 27, 1957.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Proctors for Respondent Dean Kayler, Chris Dahl
and Kayler-Dahl Fish Company.

[Endorsed]: Filed May 1, 1957.

—————
[Title of District Court and Cause.]

OPINION

Filed November 6, 1957

Appearances:

A. H. ZIEGLER, of Ziegler, Ziegler & Cloudy,
For libelant.

R. E. ROBERTSON, of Robertson, Monagle &
Eastaugh, by F. O. Eastaugh,
For respondents.

This matter came on before the court for argument upon exceptions to the amended libel filed herein, which exceptions allege as follows:

(1) That the libelant claimed injuries were suffered on September 27, 1954, more than two years prior to the filing on November 29, 1956, of the libel, and to the issuance on November 29, 1956, of the monition herein which pleadings disclose the staleness of libelant's demand and his guilt of laches for the reason that Sec. 55-2-7, ACLA 1949, provides that an action for any injury to the person or to the rights of another not arising from contract shall be brought within two years from the date of suffering such injury.

(2) That the averred facts in the amended libel are insufficient to constitute a cause of action and do not show that libelant was either a seaman, a shipper, or a passenger or that any action arises by the alleged unseaworthiness of the barge Homer, or that libelant has any claim or right of action because of such alleged unseaworthiness, or that a good, safe and proper means of reaching the pilothouse of said vessel was not furnished libelant, or that the means furnished was not in accordance with the usual construction of such vessels, or that libelant was not previously informed and knew the construction of said vessel and the means by which to reach the pilothouse thereof, or that any alleged negligence of the respondents was the proximate cause of libelant's alleged injuries.

(3) That the facts averred in the amended libel

do not constitute a cause of action within the admiralty and maritime jurisdiction of this court.

(4) That the excuse of laches, as set forth in paragraphs VII, VIII, IX, X, and XI, of the amended libel, does not constitute a valid ground to excuse libelant's failure to file his libel within two years after the cause of action arose.

It appears from the pleadings and the undisputed statements of counsel, that the sequence of events is substantially as follows:

(1) That at about 8:00 p.m. on September 27, 1954, at Excursion Inlet, Alaska, in the North Pacific Ocean, where respondents maintained their vessel Homer, libelant landed his vessel, the Rebecca, alongside the Homer, in navigable waters, and that said libelant had aboard his vessel a catch of salmon which he sold to the respondents and delivered aboard the Homer and was then directed by respondents to board the Homer in order to receive payment for the fish.

(2) That the libelant proceeded over the top deck of the Homer from the bow to the pilothouse, at or near the stern of the Homer, and that at a distance of about 8 feet from the said pilothouse the deck became uneven and that upon reaching this point of change in the level of the deck, libelant fell, striking his head against the pilothouse or other structure, sustaining injuries which resulted in his total disability.

It is admitted on the part of libelant that the libel was not filed within two years from the date of said accident but that same was filed on November 29, 1956, over two months after the statute of limitations had expired on September 27, 1956.

Libelant contends that the delay in filing the action was excusable for the following reasons:

(1) As a result of said accident, libelant had not recovered from the injury sustained before the expiration of the two-year period fixed by the Alaska statute and has not now recovered from the same.

(2) That libelant wished to delay commencement of the suit as long as possible in order to determine as well as he could the extent of his injuries.

(3) That libelant filed suit under the Alaska statute for damages before the expiration of the two-year period but that suit was filed against Kayler-Dahl Fish Company, Inc., a corporation; that libelant believed and had reported to his counsel that the barge Homer was operated by and under the control of said corporation at the time he was injured thereon.

(4) That libelant is an Indian and unfamiliar with legal matters and had no knowledge of whether this was a trade name, a company, or a corporation, but believed and reported to his counsel that it was a corporation.

(5) That after suit was filed as aforesaid against Kayler-Dahl Fish Company, a corporation,

said action was dismissed for the reason that the Kayler-Dahl Fish Company corporation had been dissolved prior to the time of the accident.

(6) That said motion to dismiss was not filed until the two-year period had expired and libelant was precluded from refileing his suit under the Alaska statute within the two-year period.

(7) That the respondents are believed to be the owners of all the assets of said dissolved corporation, which were transferred to the respondents as individuals upon dissolution.

(8) That the respondents as individuals are not prejudiced by the delay.

(9) That this is a suit in personam and the rights of lien creditors and others cannot be prejudiced thereby.

(10) That if the doctrine of laches be applied herein, libelant will be deprived of his day in court and will sustain incalculable loss and damage.

Respondent points out that the common-law suit against the nonexistent corporation was filed a mere nine days before the expiration of the two-year period for filing as permitted by the statute.

Counsel for libelant and respondents both presented able arguments in open court and carefully prepared briefs in connection therewith, and it appears to this Court that the issue is narrowed down herein to the following questions:

(1) Whether or not the allegations in the amended libel as set forth in paragraphs III and IV thereof, are sufficient to allege a cause of action based upon negligence and unseaworthiness of the vessel.

(2) Whether or not the delay in bringing this action over two months after the expiration of the statute of limitations bars the maintenance of said action.

(3) Whether or not the excuse and reasons for the delay as set forth in the pleadings are sufficient, if sustained, to excuse the laches and permit the bringing of a tardy action.

While it appears to this Court that there is considerable merit to the respondent's contention that

(1) the libel does not sufficiently allege facts showing the alleged negligence relied upon, and

(2) the libel does not properly or sufficiently allege any duty owed libelant, any failure to perform such duty, or any injuries resulting therefrom.

I do not feel a finding on these points is necessary in view of the determination made hereinafter upon the question presented alleging failure to bring the action herein timely, that is, within the period after the cause of action arose, as required by Sec. 55-2-7 ACLA 1949.

I hold that this case is one barred by the statute and that the excuses presented for the laches of

libelant in failure to bring the action within the two-year period are insufficient reasons in law or equity.

It is pointed out in libelant's brief that the powers of a court of admiralty are so broad and the considerations which impel its actions so extensive that it has been called, as distinguished from a court of law or a court of equity, a court of justice.

It should here be pointed out that Justice wields a two-edged sword; the rights of both parties to an issue must be examined. The basic reasons for a statute of limitation are to encourage promptness in the prosecution of remedies and to discourage delay. It is just as necessary to protect one against whom a claim might be asserted as it is to guard the rights of a claimant, but the statute of limitation is aimed to protect one against whom a claim might be asserted from penalties resulting from the passage of time, when witnesses have died, scattered, or disappeared, evidence has vanished or been misplaced, lost, or destroyed, facts have been obscured by defect of memory and lapse of time, as well as from the element of surprise.

Where statutes of limitation are passed they point out to those who would use the court that the courts are open to claimants for the period permitted under the statute and not thereafter, and it is only in the case of the gravest injustice, under most exceptional circumstances, where no fault inures to the claimant, and then only in the exercise of sound judgment where real equitable considera-

tions exist, that the court is permitted to exercise discretion in waiving the laches complained of. *Westfall Larson & Co., et al., vs. Allman-Hubble Tugboat Co.*, 73 F. 2d. 200.

None of the excuses or reasons for delay are sufficient to overcome the presumption of prejudice to respondent.

None of these reasons present a condition which proper diligence could not have avoided.

The common-law action is barred and it would be inconsistent to allow libelant to sue in admiralty with the same effect as at common law thereafter under these circumstances. *McGrath v. Panama R. Co.*, 298 F. 303; *Marshall v. International Mercantile Marine Co.* 39 F. 2d. 551.

The exceptions are allowed and the complaint and the action will be dismissed with prejudice.

Respondents will prepare and present proper judgment.

/s/ RAYMOND J. KELLY,
U. S. District Judge.

[Endorsed]: Filed November 6, 1957.

[Title of District Court and Cause.]

ORDER AMENDING OPINION

This Court, having on November 6th, 1957, rendered its opinion, allowing the exceptions filed by

respondent, to the libel, and providing that the complaint and the action will be dismissed with prejudice; and,

Proctors for libelant having orally applied for permission to file an Amended Libel.

Now, therefore, it is hereby ordered that the Opinion of the Court is amended to provide as follows:

“The exceptions of Respondent are allowed, and the libelant is allowed thirty days from November 7th, 1957, in which to file an Amended Libel, and that upon his failure so to do, the suit and action will be dismissed with prejudice.”

Dated at Ketchikan, Alaska, November 7th, 1957.

/s/ RAYMOND J. KELLY,
Judge.

[Title of District Court and Cause.]

SECOND AMENDED LIBEL

Comes now libelant, leave of Court first having been obtained, and files his second amended libel, and alleges:

I.

That at the times herein mentioned the above-named persons were engaged, under the name and style of Kayler-Dahl Fish Company, in Alaska, in the commercial fishery, and maintained at Excur-sion Inlet, Alaska, in the North Pacific Ocean, the

vessel Homer; that the above-named persons ownèd said vessel and controlled and operated same in connection with said fishery.

II.

That at about 8 p.m. on September 27th, 1954, at said place, libelant landed his vessel, the Rebecca, alongside the Homer, in the navigable waters of the North Pacific Ocean; that he then had aboard his vessel a catch of salmon and sold the same to respondent, delivered same aboard the Homer, and was directed by respondent to board the Homer in order to receive payment for his fish so delivered.

III.

That in order to do so, he was obliged to and did, proceed over the top deck of the Homer, from the bow to the pilot house at the stern of the Homer; that in so doing, and at a distance of eight feet, more or less, from the pilot house, the deck was constructed in an uneven manner, and dropped down several feet from the deck over which libelant was proceeding; that upon reaching the point where there was such change in the level of the deck, libelant fell and struck his head with great force against the pilothouse, or other structure of the Homer, sustaining injuries which resulted in his total blindness and total disability.

IV.

That libelant was invited and instructed by respondents to go aboard the Homer to receive

payment for his fish; that it was the duty of respondents, the owner, master and officers of the *Homer* to provide libelant with a good, safe means of reaching the pilothouse and a seaworthy vessel for said purpose, and to keep said vessel and passageway sufficiently lighted so the libelant could see and observe the condition thereof; that they failed so to do in that the deck, passageway and pilothouse were dark and insufficiently lighted to enable libelant to see or observe that the deck where libelant fell was uneven; that the respondents, the owner, master and officers of the *Homer* were negligent in failing to provide such adequate and sufficient lighting and libelant's injuries and consequent damages are a direct result of said negligence, and that said injuries were not due to any negligence on the part of the libelant.

V.

That as a result of said accident libelant sustained the following injuries: fracture, skull, occipital, with cerebral concussion, hypertrophic osteoarthritis changes in the cervical vertebrae and strain of cervical and lumbar muscles, caused by the fall, resulting in total blindness, pain and suffering and loss of earning ability, to his total damage of \$50,000.00.

VI.

That all and singular the matters set forth herein are true and within the admiralty jurisdiction of this Honorable Court.

VII.

Libelant alleges that the libel was not filed within two years from the date of the accident, but alleges libelant was not guilty of laches and the delay is not inexcusable for the following reasons.

VIII.

As a result of said accident libelant had not recovered from the injuries sustained before the expiration of the two-year period fixed by the Alaska Statute, and has not now recovered from same; that he wished to delay commencement of the suit as long as possible in order to determine as well as he could the extent of his injuries; that, however, he filed a suit under the Alaska Statute for damages before the expiration of said two-year period; that said suit was filed against Kayler-Dahl Fish Co., Inc., a corporation; that libelant believed and reported to his counsel that the owner of the barge *Homer*, upon which he was injured, was operated by and under the control of said corporation; that libelant is an Indian and unfamiliar with legal matters as to whether anyone who represents itself as a company, which respondent did at the time of the accident, was a trade name, company or corporation, but honestly believed and so reported to his counsel that respondent was a corporation; that after suit was filed against respondent as a corporation, a motion was filed to dismiss based on the ground that Kayler-Dahl Fish Co., Inc., a corporation was not in existence on the date of the accident, although it had been in existence

as a corporation for a long time prior to the accident; that investigation of respondent's claim as to the dissolution of the corporation disclosed that the corporation had been dissolved prior to the date of the accident; that for such reason libelant could not oppose said motion to dismiss and his action brought under the Alaska Statute was dismissed; that said motion was not filed until the two-year period had expired and libelant could not refile his suit under the Alaska Statute within the two-year period.

IX.

Libelant further alleges in support of his claim that the delay was not inexcusable, as follows: That when he was first injured he consulted counsel, other than his present Proctors; that said counsel prepared, but did not file, a complaint for his injuries; that said complaint was framed against the respondents as a corporation; that his then counsel moved from the Territory of Alaska; that said complaint was furnished to libelant's present proctors who had reference thereto in preparing his suit under the Alaska two-year statute; that, however, before filing the suit which was dismissed, his present proctors, so he is informed, alleges and believes, duly checked the Record of Corporations in the Territory of Alaska, which Directory was prepared and distributed by the Territory, and learned therefrom that Kayler-Dahl Fish Co., Inc., appeared in said Directory as a corporation, incorporated in the State of Washington, Sept. 5, 1947, and filed in Alaska June 1, 1949.

X.

Libelant believes and alleges that respondents are the owners of all the assets of said dissolved corporation; that upon dissolution, the entire assets were transferred to the respondents who still conducted the business under the name of Kayler-Dahl Fish Company; that any judgment in this suit against respondents would be against them as individuals and they are not prejudiced by the short delay any greater than if the suit under the Alaska two-year statute had been commenced against them as individuals, rather than as a corporation, as it was.

XI.

Libelant further alleges that this is a suit in personam, and the rights of lien creditors and others cannot be prejudiced by prosecution of this suit; but, if so, such rights can be protected by the Court at the trial.

XII.

Libelant further alleges that this suit and situation should have applied to it the equitable principles of the Admiralty Court, and that if the doctrine of laches be applied he will be deprived of his day in court and will sustain incalculable loss and damage.

Wherefore, Libelant prays that process in due form of law issue against the respondents, requiring them to answer the premises, and that this Honorable Court may decree to the libelant as follows:

Damages in the sum of \$50,000.00, with attorney

fees and costs, and such other, further and different relief as to the Court may seem equitable.

ZIEGLER, ZIEGLER &
CLOUDY,

By /s/ A. H. ZIEGLER,
Proctors.

Duly verified.

[Endorsed]: Filed December 2, 1957.

[Title of District Court and Cause.]

EXCEPTIONS TO SECOND AMENDED LIBEL

To the District Court for the District of Alaska,
Division Number One, at Ketchikan, in Ad-
miralty:

The exceptions of Respondents Dean Kayler, Chris Dahl, and Kayler-Dahl Fish Company, claimants of the vessel Homer, allege as follows:

1.

That it appears from the Second Amended Libel and its averments that Libelant's claimed injuries were suffered on September 27, 1954, more than two years prior to the filing on November 29, 1956, of the Libel and to the issuance on November 29, 1956, of the Monition herein, which disclose the staleness of Libelant's demand and his guilt of laches herein, whereas Section 55-2-27, ACLA, 1949, provides that an action for any injury to the person or to the rights

of another not arising from contract shall be brought within two years from the date of suffering such injury.

2.

That the facts averred in the Second Amended Libel are insufficient to constitute a cause of action, and do not show that Libelant was either a seaman, a shipper or a passenger, or that the alleged unseaworthiness of the barge Homer gives any right of action to Libelant, or that Libelant has any claim or right of action against Libelees because of the alleged unseaworthiness of the barge Homer, or that a good, safe and proper means of reaching the pilot house of said vessel was not furnished to Libelant or that the means furnished was not in accordance with the usual construction of such vessels as the barge Homer, or that Libelant was not priorly informed and knew the construction of said vessel and the means by which to reach the pilot house thereof, or that Libelant's alleged injuries were proximately caused by any negligence of Libelees or either of them.

3.

That the facts averred in the Second Amended Libel do not constitute a cause of action within the admiralty and maritime jurisdiction of this Court.

4.

Libelees further except to Paragraphs VII, VIII, IX, X, XI and XII of the Second Amended Libel on the ground they do not state a valid excuse for Libelant's failure to file his action within two years

from the date of incurring his alleged injuries on September 27, 1954, and fail to show that Libelees or any of them were at fault for Libelant's said failure; that Libelant was represented by competent, practicing proctors prior to two years before September 27, 1956; that the corporate records of the Territory of Alaska are public records, and Libelant and his proctors knew or should have known when he instituted in this Court his civil action No. 3731-KA, that no corporation by the name of Kayler-Dahl Fish Co., Inc., or similar name, was registered for the doing of business in Alaska on September 27, 1954, and also that the U. S. Customs records, which are also public records, did not show that on September 27, 1954, any such named or similarly named corporation owned or had any interest in the barge Homer; that Libelees have never been officially informed that said Civil Action No. 3731-KA has been dismissed; that Libelant is solely at fault for his staleness and laches in instituting this suit and in presenting his claim therein.

Dated at Juneau, Alaska, December 10, 1957.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Proctors for Respondent Dean Kayler, Chris Dahl
and Kayler-Dahl Fish Company.

[Endorsed]: Filed December 14, 1957.

[Title of District Court and Cause.]

OPINION

Filed July 8, 1958

Appearances:

A. H. ZIEGLER, of Ziegler, Ziegler & Cloudy,
Ketchikan, for Libelant.

ROBERTSON, MONAGLE & EASTAUGH,
by F. O. Eastaugh, Juneau, for Respond-
ents.

This matter comes before this court upon excep-
tions to the second amended libel filed herein by the
respondents. The court had heard the exceptions to
the first amended libel filed herein and after oral
argument and briefs from the parties, filed an
opinion allowing the exceptions of respondents and
allowing libelant 30 days from November 7, 1957, in
which to file an amended libel. It is this which is now
before us.

A careful reading of the second amended libel does
not disclose to this Court any facts pleaded, which,
if proven, would be sufficient to excuse the delay in
filing this action, nor does it disclose any new facts
which, if proven on the trial, would overcome the
presumption of prejudice which exists as set forth
in the former opinion herein. The presumption of
prejudice still exists, and libelant's claim that no
prejudice to respondents has resulted by reason of
delay cannot be considered because the presumption
exists and nothing in the second amended libel re-
moves it.

The element of laches still exists and nothing in the second amended libel states any facts which make it inequitable to apply this doctrine here. As a matter of fact it would be extremely inequitable not to apply it. The libelant waited almost two years and just before the statute of limitations would run, filed suit. However, the action was brought against improperly named parties and for that reason was dismissed.

All of the cases cited by the libelant show circumstances which did not exist here. In *Walker v. Foster*, 92 F. Supp. 402, the amended complaint contained the necessary allegations to overcome the presumption of prejudice. No such facts are pleaded here. In *McDaniel v. Gulf & South American Steamship Co., Inc.*, 228 F. 2d 189, the court found that the positive averments of the libel disclosed a case of clearly excusable delay because of the mental condition of the libelant arising by reason of a fractured skull as a result of the accident about which the action arose. In the case cited by libelant, *The Fulton*, 54 F. 2d 467, an equitable reason appeared for not applying the bar of laches and this consisted of protracted negotiations for settlement. In *Gardner v. Panama Railroad Co.*, 342 U. S. 29, the petitioner had diligently sought redress and had twice within the year following her injuries brought suit. The second action abated through an act of Congress and not through any fault of her own, and the United States Supreme Court determined that there was excusable delay for these reasons.

It is unnecessary to go into all of the cases cited by libelant in his supporting brief for the reason that in accordance with the previous opinion of this Court, the libelant's second amended libel discloses no equitable reason for the Court making any change in the decision rendered.

None of the matters stated in the second amended libel is sufficient to excuse libelant's failure to file his libel within the period allowed by the statute of limitations, and no facts are pleaded therein which would overcome the presumption of prejudice cloaking the respondents.

The foregoing shall constitute Findings of Fact and Conclusions of Law unless the parties desire additional Findings or Conclusions.

Respondents will prepare and present proper judgment in accordance herewith.

/s/ RAYMOND J. KELLY,
U. S. District Judge.

[Endorsed]: Filed July 8, 1958.

[Title of District Court and Cause.]

NOTICE OF SETTLEMENT OF DECREE

To: Ziegler, Ziegler & Cloudy, Proctors for Libelant:

Please Take Notice that a Final Decree, of which the within is a copy, will be presented for settle-

ment and signature to the Honorable Raymond J. Kelly, Judge of the above-entitled Court, in open Court at Juneau, Alaska, on the 28th day of July, 1958.

Dated at Juneau, Alaska, this 21st day of July, 1958.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ F. O. EASTAUGH,
Proctors for Respondents.

[Endorsed]: Filed July 21, 1958.

In the District Court for the District of Alaska,
Division Number One, at Ketchikan
In Admiralty—File No. 3773—KA

JACK PAUL BROWN,

Libelant,

vs.

DEAN KAYLER, CHRIS DAHL and JOHN
DOE, d/b/a KAYLER-DAHL FISH COM-
PANY,

Respondents.

FINAL DECREE

This cause having duly come before the Court upon Respondents' Exceptions to the Amended Libel by brief and oral argument of counsel for

the parties on October 15, 1957, and the Court having made and filed herein its Opinion of November 6, 1957, amended on November 7, 1957, to permit Libelant to amend, and upon Respondents' Exceptions to Libelant's Second Amended Libel, submitted to the Court upon briefs of counsel for the parties hereto, and the Court having made and filed its Opinion of July 8, 1958, directing a Decree dismissing the Second Amended Libel with prejudice,

Now, on motion of Robertson, Monagle & Eastaugh, Proctors for Respondents, it is

Ordered that the Opinions of this Court, heretofore made and filed herein, respectively, dated November 6, 1957, as amended as aforesaid, and July 8, 1958, be and they are hereby adopted as Findings of Fact and Conclusions of Law pursuant to Supreme Court Rule 46 $\frac{1}{2}$, and it is further

Ordered, Adjudged and Decreed, that the Second Amended Libel herein be and the same hereby is dismissed with prejudice, each party to bear its own costs.

Done in open Court at Juneau, Alaska, this 28th day of July, 1958.

/s/ RAYMOND J. KELLY,
U. S. District Judge.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above-Named Respondent, and Their Proctors, Robertson, Monagle and Eastaugh:

Notice Is Hereby Given that the above-named Libelant hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on July 28th, 1958.

Dated October 24th, 1958.

ZIEGLER, ZIEGLER &
CLOUDY,

By /s/ A. H. ZIEGLER,
Proctors for Libelant.

[Endorsed]: Filed October 24, 1958.

[Title of District Court and Cause.]

POINTS ON APPEAL

Appellant hereby states the points on which he will rely on this appeal.

1. The Court erred in sustaining the exceptions of Respondent to the Libel.

2. The Court erred in entering judgment in favor of Respondent and against Libelant in dismissing Libelant's Second Amended Libel.

Dated October 24th, 1958.

ZIEGLER, ZIEGLER &
CLOUDY,

By /s/ A. H. ZIEGLER,
Proctors for Libelant.

[Endorsed]: Filed October 24, 1958.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That the undersigned principal and the undersigned surety are held and firmly bound unto the respondent, in the full sum of \$250.00, lawful money of the United States of America, to be paid to said respondent, their heirs, executors, administrators and assigns, to which payment, well and truly to be made, the said principal and surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed with our seals and dated this 24th day of October, 1958.

Whereas, Libelant have prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit from a final judgment of the District Court for the District of Alaska, Division Number One at Ketchikan, bearing date July 28th, 1958.

Now, Therefore, the condition of this obligation is such that if the above-named appellant, shall prosecute said appeal to effect, and pay all costs which may be awarded against him as such appellant if the appeal is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

JACK PAUL BROWN,

By /s/ A. H. ZIEGLER,
Attorney, Principal;

/s/ A. D. ROBERTSON,
Surety.

[Endorsed]: Filed October 24, 1958.

[Title of District Court and Cause.]

MINUTE ORDERS

Monday—April 8, 1957

There appeared Mr. A. H. Ziegler who moved for permission to file an amended Libel herein and asked for 21 days in which to file.

The Court granted permission for the filing and also the time requested.

Friday—May 10, 1957

At this time the Court announced that a telegram had been received from R. E. Robertson, counsel for defendants by which he agreed that hearings

on Defendants' exceptions to the Amended Libel could go over until the return of A. H. Ziegler from the south. The Court thereupon ordered that the matter be put over till the Fall Term.

Tuesday—October 15, 1957

This case came before the Court for hearing on Respondents' Exceptions to the Amended Libel herein. A. H. Ziegler appeared for Libelant; F. O. Eastaugh appeared for Respondent, in behalf of R. E. Robertson. Counsel argued the exceptions before the Court with Mr. Eastaugh commencing with No. 3 on Jurisdiction; then on to Exception numbered 2, with Nos. 1 and 4 being argued together. Mr. Ziegler then presented his argument following which the Court took the matter under advisement with counsel filing their briefs.

Wednesday—November 6, 1957

There appeared A. H. Ziegler who asked the Court to amend its recent Opinion in this case to include an exception therein to Libelant or to allow 30 days for the filing of an Amended Libel if he so desired.

The Court granted the request.

Thursday—November 7, 1957

Upon the presentation of an Order by Proctors of record, the Court signed the Order; ordered it filed and entered.

Friday—April 11, 1958

Upon the request of counsel, this matter was reset for hearing and argument on April 25th.

Friday—April 25, 1958

This matter came upon the Motion Calendar for hearing Respondent's Exceptions to the Seconded Amended Libel. The Court stated that a telegram had been received from Mr. R. E. Robertson, Proctor for Respondent, by which he asked permission to submit this matter by briefs. The Court, at this time, ruled that the matter would be heard on briefs and allowed 30 days for the filing of Respondent's brief; 30 days to Libelant for an answering brief, and 10 days for a reply brief if found necessary.

Monday—July 28, 1958

Upon presentation by F. O. Eastaugh, Proctor for Respondents, the Court signed the Final Decree in this cause, ordered it filed and entered.

[Title of District Court and Cause.]

CLERK'S PROOF OF SERVICE

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One thereof, do hereby certify that a certified copy of Appeal & Points on Appeal were mailed to

Robertson, Monagle & Eastaugh, Attorneys at Law,
Box 1211, Juneau, Alaska, on October 24, 1958.

[Seal] /s/ J. W. LEIVERS,
Clerk of the District Court for the District of
Alaska, Division Number One, at Ketchikan.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and all orders of the Court filed in the within cause, and constitute the record on Appeal as designated by the appellant.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled Court to be affixed at Ketchikan, Alaska, this 24th day of November, 1958.

[Seal] /s/ J. W. LEIVERS,
Clerk of the District Court for the District of
Alaska, Division Number One, at Ketchikan.

[Endorsed]: No. 16292. United States Court of Appeals for the Ninth Circuit. Jack Paul Brown, Appellant, vs. Dean Kayler, Chris Dahl d/b/a Kayler-Dahl Fish Company, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed: December 5, 1958.

Docketed: December 17, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.